

**Dr. Ramachandran a/l Sivaguru v.
Perwira Habib Bank Malaysia Bhd. & Anor.**

[1993] 3 CLJ

Siti Norma Yaakob J.

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DR. RAMACHANDRAN A/L SIVAGURU

v.

**PERWIRA HABIB BANK MALAYSIA
BHD. & ANOR.**

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-552-92]
7 JUNE 1993

PRACTICE & PROCEDURE: *Application to set aside writ and statement of claim - O. 18 r. 19 Rules of the High Court 1980 - Claim filed to set aside judgment obtained by first defendant against plaintiff in earlier suit - Whether judgment in earlier suit obtained by fraud - Whether plaintiff in possession of further evidence which could not be adduced in earlier suit - Whether claim bona fide.*

The plaintiff executed a guarantee in favour of the first defendant in respect of a term loan granted by the first defendant to the second defendant. The second defendant defaulted in repayment of the loan and the first defendant sued the plaintiff on the guarantee and obtained judgment.

The plaintiff subsequently filed a suit to set aside the judgment obtained by the first defendant against him and the first defendant applied under O. 18 r. 19 Rules of the High Court to set aside the plaintiff's writ and statement of claim. The question that arose was whether the plaintiff had shown either that the judgment in the earlier suit was obtained by fraud or that he now had further evidence which could not possibly be adduced in the earlier trial.

Held:

[1] All the objections raised by the plaintiff could easily have been raised by him in the O. 14 proceedings in the earlier action as all the facts must have been known to him then and he was represented by Counsel. To re-open the same issues in this action was an abuse of the powers of the Court and to that extent *res judicata* in the wider sense applies as to nullify the present proceedings against the first defendant.

[2] There was also no evidence of the allegations of fraud, false misrepresentation or conspiracy averred to by the plaintiff as to the obtaining of the judgment and in the

a circumstances the filing of the suit was nothing more than a means to circumvent the time bar for appeal. To that extent the plaintiff's claims lack *bona fides*.

[First defendant's application allowed. Plaintiff's writ and statement of claim struck out with costs].

Cases referred to:

Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143 (fol)
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581 (refd)

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19

For the plaintiff - *K.S. Dass; M/s. K. Sila Dass & Partners*

For the defendant - *S.M. Yoong; M/s. Shook Lin & Bok*

JUDGMENT

Siti Norma Yaakob J:

In these proceedings, the plaintiff seeks to set aside the judgment dated 6 April 1987, obtained by the first defendant against him in Kuala Lumpur Civil Suit No. C23-1879-86. In applying to set aside the writ and statement of claim under O. 18 r. 19 and under the inherent jurisdiction of the Court, the first defendant have disclosed the following facts.

In Civil Suit No. C23-1879-86 (the earlier suit), the first defendant had sued the plaintiff on a guarantee dated 28 February 1984, which the plaintiff had executed in favour of the first defendant in respect of a term loan of RM200,000 granted by the first defendant to the second defendant.

The second defendant was not a party to the earlier action.

Order 14 proceedings were commenced by the first defendant against the plaintiff in the earlier suit. The plaintiff, who was represented by Counsel at all times, opposed the O. 14 application and on 6 April 1987, Shanker J. granted leave to the plaintiff to defend the earlier suit on condition he deposits RM120,000 into Court within 3 weeks of the order, failing which judgment for the amount claimed by the first defendant would be entered against the plaintiff with interests and costs. The plaintiff failed to make the deposit

within the time limited and as a result the judgment crystallised. The plaintiff has not appealed against the judgment but instead filed this suit five years later to have the judgment set aside based on the following grounds:

1. The first defendant did not check his background and that they would not be relying on the guarantee.
2. The first defendant had suppressed material information from the plaintiff in that the loan had already been disbursed to the second defendant before the guarantee was executed.
3. Another security given for the term loan, a charge, was not provided by a company known as Tajaria Sdn. Bhd. in accordance with the first defendant's letter of offer.
4. The first defendant had not obtained a proper valuation over the charged land.

The law on the setting aside of judgments regularly obtained is clearly set out by the then Federal Court in the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143, to be the following:

Clearly the Court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 ... so far as is necessary to correct errors in expressing the intention of the court ... But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

Since the plaintiff has filed fresh proceedings to impeach the judgment, he must therefore show that either the judgment in the earlier suit was obtained by fraud or that he has now further evidence which could not possibly be adduced in the earlier suit.

From his statement of claim, it is clear that the plaintiff relies on both fraud and the possession of further evidence to have the judgment set aside and since they are inter-related and have a bearing to the 4 grounds that I have listed above, I shall now deal with these grounds to determine whether the plaintiff has a cause of action against the first defendant.

a The plaintiff has admitted that he had executed the guarantee. He is a doctor, a highly educated person, and he must therefore know the consequences of his action when he signed the guarantee. The fact that the first defendant had accepted him as a guarantor is a clear indication that the first defendant must have been fully satisfied of his credentials and from the very nature of the document that he executed, the plaintiff must realise that certain obligations on his part have been created which, if unfulfilled, entitle the first defendant to enforce the guarantee. This had in fact happened. The second defendant had defaulted on the term loan as he failed to make repayment and this entitles the first defendant to enforce the guarantee which the plaintiff had given. To that extent, objection as to how the first defendant should react when dealing with a proposed guarantor is a non-issue.

d The guarantee has been dated 28 February 1984, and the plaintiff alleges that the first defendant had not informed him of the fact that the second defendant had withdrawn a substantial part of the loan the same day and the balance on 9 March 1984, from his current account which he had opened with the first defendant on 22 February 1984, with a deposit of RM500. For this the plaintiff relies on the statement of account of the second defendant issued by the first defendant.

e From the statement it is clear that the second defendant had a credit of RM500 in his account as at 22 February, 1984. On 23 February 1984, there is a debit of RM3.75, thereby leaving a credit of only RM496.25. On 28 February 1984, there was a large withdrawal of RM150,002.15 and against a credit of only RM496.25, it can only mean that the second defendant's account is not a current account but an overdraft account which is a distinct and separate account and has nothing to do with the term loan or the guarantee executed by the plaintiff. In that respect, the first defendant had also sued the second defendant in Kuala Lumpur Civil Suit No. 24-3375-86 for sums due on the overdraft account and to that extent, there is no truth in the plaintiff's allegation that the first defendant had suppressed the information that the loan had been disbursed to the second defendant before he executed the guarantee. In fact nothing of that kind happened as the loan of RM200,000 was only disbursed to the second defendant on

8 February 1985, after the other security for the loan, a land charge had been executed in favour of the first defendant. This is evidenced by the first defendant's statement of accounts in respect of the second defendant's term loan.

As I have indicated above, besides the plaintiff's guarantee, the other security for the term loan is a charge which under the first defendant's letter of offer dated 29 February 1984, was to be created by Tajaria Sdn. Bhd., a housing developer, over a piece of property which was purchased by the second defendant with the term loan. The charge that was created on 7 November 1984, was not executed by Tajaria Sdn. Bhd. but by the second defendant instead and the objection raised by the plaintiff is that the charge is contrary to the letter of offer.

The first defendant have explained that Tajaria Sdn. Bhd. has since transferred the property, which is a link house, to the second defendant and that is why the charge was created by the second defendant and not the company. Since the security is the very same security that was agreed to in the first defendant's letter of offer, objection as to a different chargor giving the security is immaterial and is of no consequence. If there is anybody who should object to the charge, that person would be the first defendant but I consider in the circumstances the first defendant have no cause to object as what is important to the first defendant is the security and the charge that was created was the very same security that had been agreed to and since a charge can only be executed by the legal owner of the property, it follows that only the second defendant can create the charge as the link house has already been transferred to him by Tajaria Sdn. Bhd.

As for the plaintiff's objection that there was no proper valuation done over the charged property, here again there is no cause for complaint as, firstly, he has no proprietary rights over the property. His liability is governed by the terms of the guarantee he executed and under clauses 3, 5 and 6 of the guarantee, the first defendant can deal with any other security they deem fit.

All the objections raised by the plaintiff could easily have been raised by him in the O. 14 proceedings in the earlier action. This is so, as

a all facts must have been known to him then and he was represented by Counsel. To re-open the same issues in this fresh action which could easily have been raised and litigated upon in the earlier trial, is an abuse of the powers of the Court and to that extent, *res judicata* in the wider sense applies as to nullify the present proceedings against the first defendant. See the case of *Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd. & Anor.* [1975] AC 581.

c There is also no evidence of the allegations of fraud, false misrepresentation or conspiracy averred to by the plaintiff in his statement of claim as to the obtaining of the judgment and in the circumstances of this case the filing of this suit is nothing more than a means to circumvent the time bar for appeal. To that extent, his claims lack *bona fides* and appear as no more than an attempt to delay bankruptcy proceedings which have already been commenced against him in respect of the same judgment.

e For the reasons I have given, the plaintiff has no cause of action against the first defendant and on that conclusion, I had allowed the first defendant's application to have the writ and statement of claim issued by the plaintiff struck out with costs.

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